NATIONAL PRIVATE TRUCK COUNCIL, INC. vs. COMMISSIONER OF REVENUE.

Suffolk. September 5, 1997 - December 22, 1997.

Present: WILKINS, C.J., ABRAMS, LYNCH, GREANEY, FRIED, MARSHALL, & IRELAND, JJ.

Regulation. Taxation, Income tax, Excise. *Constitutional Law,* Taxation, Federal preemption. Interstate commerce, Commerce clause. *Interstate Commerce.*

Public Law 86-272, codified at 15 U.S.C. § 381 (1994), affording tax immunity to foreign corporations whose only contact with Massachusetts consists of soliciting orders for tangible personal property and delivering such property into the Commonwealth from a point outside Massachusetts, preempts the provisions of 830 Code Mass. Regs. § 63.39.1(5) (1993), as interpreted and imposed by the Commissioner of Revenue to exempt from taxation corporations using common or contract carriers for such shipments or deliveries but to subject to taxation corporations using private carriers, inasmuch as § 381 makes no such distinction and there was a clear and manifest congressional intent to preempt such State regulations. [328-329]

Section 381 of 15 U.S.C. (1994), prohibiting States from imposing taxes that interfere with interstate commerce is within Congress's authority under the commerce clause and does not implicate the Tenth Amendment to the Constitution of the United States. [329-331]

CIVIL ACTION commenced in the Superior Court Department on September 30, 1993.

The case was heard by *David M. Roseman,* J., on a statement of agreed facts.

The Supreme Judicial Court granted an application for direct appellate review.

Thomas A. Barnico, Assistant Attorney General, for the Commissioner of Revenue.

Richard P. Schweitzer, of the District of Columbia (*Wesley S. Chused* with him) for National Private Truck Council, Inc.

ABRAMS, J. At issue is the question whether 830 Code Mass. Regs. § 63.39.1(5) (1993) (regulation) violates Federal statute, Pub. L. 86-272, codified at 15 U.S.C. § 381 (1994), and

whether, as the Commissioner of Revenue (commissioner) argues, § 381 is unconstitutional as it unduly impairs the sovereign power of the State to tax interstate commerce within its borders and thus violates the United States Constitution's Tenth Amendment reservation of power to the States. The plaintiff filed a complaint in Superior Court seeking a declaration that the Federal statute preempts the regulation and that Congress was within its power in enacting § 381. The parties filed a statement of agreed facts and cross motions for summary judgment. A judge in the Superior Court entered a declaration that the regulation "violates 15 U.S.C. § 381 ([Pub. L.] 86-272) by reducing the scope of tax immunity the [F]ederal statute affords to foreign corporations whose only contact with Massachusetts consists of soliciting orders for tangible personal property, and delivering such property into the Commonwealth from a point outside Massachusetts in the corporation's private vehicles; [t]hat 830 Code Mass. Regs. [§] 63.39.1(5) (1993) as applied to such foreign corporations is hereby declared to be preempted by 15 U.S.C. § 381 ([Pub. L.] 86-272); and [t]hat 15 U.S.C. § 381 ([Pub. L.] 86-272) is constitutional." The commissioner appealed. We granted the plaintiff's application for direct appellate review. We agree with the declaration entered by the Superior Court judge. We affirm.

We set forth the agreed facts. The plaintiff is the national trade association of more than 1,000 corporations that operate their own truck fleets to transport and deliver their products. Some of the plaintiff's members own their own trucks. Other members lease the trucks used for delivery from a subsidiary corporation, or from another carrier. A number of the plaintiff's members, not incorporated or based in Massachusetts, regularly solicit sales of tangible goods in Massachusetts. These orders are sent outside the Commonwealth for approval, and once approved, are filled from a point outside Massachusetts. The plaintiff's members then use their own trucks to make deliveries to their customers in Massachusetts.[1]

Section 381 expressly restricts the authority of a State to

[1]This type of transportation arrangement, where a company transports its goods in vehicles owned or leased by it, is known as "private carriage." "Common carriage" or "contract carriage," by contrast, is for-hire transportation in which the shipper and the carrier are different entities. The parties have stipulated that, for the purposes of this case, there is no difference between "common" and "contract" carriers and we refer to both simply as "common carriers."

impose an income tax on foreign corporations whose business within the State consists solely of "the solicitation of orders . . . for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State."[2]

The regulation, promulgated by the commissioner on January 1, 1990, pursuant to his authority under G. L. c. 62C, § 3, governs the question whether a foreign corporation is subject to the Massachusetts excise tax under G. L. c. 63, § 39 (1990 ed.).[3] The regulation includes, among other things, a section entitled, "Exception for Solicitation Activities Protected by [§ 381]." This exception states that a foreign corporation whose activities fall within the scope of the Massachusetts statute and regulation "nevertheless is not subject to Massachusetts taxation if Massachusetts is precluded from exercising its jurisdic-

[2]The relevant portions of 15 U.S.C. § 381 (1984) provide: "(a) . . . No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 1959, a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:

"(1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for authorization or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and

"(2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

"(b) . . . The provisions of subsection (a) of this section shall not apply to the imposition of a net income tax by any State, or political subdivision thereof, with respect to —

"(1) any corporation which is incorporated under the laws of such State; or

"(2) any individual who, under the laws of such State, is domiciled in, or a resident of, such State."

[3]General Laws c. 63, § 39, provides in part: "Except as otherwise provided herein, every foreign corporation . . . actually doing business in the commonwealth, or owning or using any part or all of its capital, plant or any other property in the commonwealth, shall pay [excise tax]. . . .

"A foreign corporation shall not be subject to tax under this chapter if the foreign corporation is engaged in the business of selling tangible personal property and taxation of that foreign corporation under this chapter is precluded by the Constitution or laws of the United States . . . ."

tion by [§ 381]." The regulation interprets § 381 as not imposing the Massachusetts excise on a foreign corporation:

> "if the sole activity of the corporation in Massachusetts is the solicitation by the corporation's representatives (in the name of the corporation or in the name of a prospective customer) of orders for the sale of tangible personal property, provided that the orders are sent outside Massachusetts for approval or rejection, and provided that the orders are filled by shipment or delivery by common carrier or contract carrier from a point outside of Massachusetts."[4]

The parties agree that the regulation exempts from State taxation entities that solicit in Massachusetts orders approved and filled from a point outside out of the State who use common carriers to fill their orders in State. The Commissioner, however, claims that § 381 does not exempt similarly situated entities who use their own vehicles to bring their goods into Massachusetts. The plaintiff contends that § 381 preempts the regulation.

Generally preemption is not favored. *Sawash* v. *Suburban Welders Supply Co.*, 407 Mass. 311, 315 (1990). Because § 381 impinges on the States' sovereign powers of taxation, "unless

[4]Title 830 Code Mass. Regs. § 63.39.1(5)(a) provides, in pertinent part: "A foreign corporation whose activities fall within those described in G.L. c. 63, [§] 39 and 830 [Code Mass. Regs. §] 63.39.1(4) [listing those things that subject a corporation to taxation] nevertheless is not subject to Massachusetts taxation if Massachusetts is precluded from exercising its jurisdiction by [Pub. L.] 86-272 . . . . [Pub. L.] 86-272 currently precludes the imposition of the excise under [G.L.] c. 63, [§] 39, upon a foreign corporation if the sole activity of the corporation in Massachusetts is the solicitation by the corporation's representatives (in the name of the corporation or in the name of a prospective customer) of orders for the sale of tangible personal property, provided that the orders are sent outside Massachusetts for approval or rejection, and provided that the orders are filled by shipment or delivery by common carrier or contract carrier from a point outside of Massachusetts."

The regulation also provides the following example of a foreign corporation subject to tax: "Humble Homes is a foreign corporation that sells furniture. The company regularly delivers furniture that it had sold to locations in Massachusetts using its own delivery trucks. The delivery trucks are corporate property that the company owns or uses in Massachusetts in a corporate capacity within the meaning of 830 Code Mass. Regs. 63.39.1(4)(d). The delivery of goods does not constitute 'solicitation' of orders. Humble Homes is therefore subject to the excise under G. L. c. 63, § 39." 830 Code Mass. Regs. § 63.39.1(10), example 8.

Congress conveys its purpose clearly, it will not be deemed to have significantly changed the Federal-State balance." *Heublein, Inc.* v. *South Carolina Tax Comm'n*, 409 U.S. 275, 281-282 (1972), quoting *United States* v. *Bass*, 404 U.S. 336, 349 (1971); *English* v. *General Elec. Co.*, 496 U.S. 72, 79 (1990) ("state law is pre-empted to the extent that it actually conflicts with federal law"). Here Congress has made its purpose clear. "Section 381 was designed to define clearly a lower limit for the exercise of [State taxing] power. . . . By establishing such a limit, Congress did, of course, implicitly determine that the State's interest in taxing business activities below that limit was weaker than the national interest in promoting an open economy." *Heublein*, *supra* at 280.

The commissioner urges us to interpret the phrase, "filled by shipment or delivery from a point outside the state" and, in particular, to construe the word "delivery" as referring to a transaction in which title passes from shipper to customer at a point outside of the State.[5] The commissioner points to provisions of the Uniform Commercial Code enacted prior to § 381 in support of his contention that Congress intended to protect only out-of-State transactions from taxation. The commissioner contends that his interpretation should prevail because § 381 includes areas that " 'traditionally [have been] occupied by the States' [and in those circumstances] congressional intent to supersede state laws must be 'clear and manifest.' " *English*, *supra* at 79, quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). The commissioner concludes that the congressional intent to supersede State tax law by enacting § 381 is not "clear and manifest." The Superior Court judge rejected the commissioner's argument, concluding that there was congressional intent to preempt the regulation, and that the term "delivery"[6] in the context of § 381 is not limited to out-of-State deliveries.

Neither the language of the statute nor its legislative history

[5]The parties agree that "shipment" refers to sending goods by mail or common carrier.

[6]We note that the dictionary definitions of the word "delivery" favor the plaintiff. Delivery is "the act of putting property into the legal possession of another." Webster's Third New Int'l Dictionary 597 (1993). Black's Law Dictionary defines delivery as the "act by which the res or substance thereof is placed within the actual or constructive possession or control of another." Black's Law Dictionary 428 (6th ed. 1990). Neither of these definitions includes the meaning suggested by the commissioner.

suggests that Congress intended the specialized meaning the commissioner urges.[7] The statute refers to shipment or delivery "from" a point outside the State, not "at" a point outside the State. The language requires only that the goods originate from out-of-State, not that the transfer of goods to the buyer occurs outside the taxing State. See 1 J. & W. Hellerstein, State Taxation at 6-32 (2d ed. 1993).

Further, the statute describes "shipment or delivery from a point outside the State" as part of the protected business activity that may take place "within the [taxing] State." Section 381. As the plaintiff argues, this makes sense only if "shipment or delivery" is read to mean transportation of goods that originate outside the taxing State and then enter the State.

Other States have reached the same conclusion we do. In construing § 381, the Supreme Court of Virginia stated that "[i]n enacting § 381, Congress did not identify any manner of delivery necessary to qualify for immunity. Section 381 does not specify common carrier, contract or private carrier, or any other particular method of delivery." *Virginia Dep't of Taxation* v. *National Private Truck Council, Inc.*, 253 Va. 74, 77 (1997). The tax authorities in New Jersey and New York have also opined that private carriage is protected by § 381. See New Jersey State Tax News at 4 (Spring 1996); New York Advisory Op. TSB-A-84 (11)C (September 14, 1984). But see Florida Tech. Assistance Advisement No. 95(c)1-004 (March 17, 1995) (advising that private carriage is not protected by § 381).

The commissioner also argues the regulation should be upheld because § 381 is unconstitutional. The commissioner contends that § 381 unduly impairs the sovereign power of the State to

[7]Legislative history supports our interpretation. "[I]f the only business presence within the State by a [company] engaged in interstate commerce is the solicitation . . . of orders for sales of tangible personal property and the orders are sent to an office out of state for approval or rejection, and if the order is approved, it is filled by shipment or delivery from a stock of goods, warehouse, plant, or factory located out of the State, the net income tax of the State . . . on income derived within the State by such [company] from interstate commerce may not be imposed." S. Rep. No. 658, 86th Cong., 1st Sess., pt. 6, at 2553 (1959) (Committee on Finance).

Moreover, there are indications that Congress in fact sought to avoid exposing corporations to taxation based on the sort of distinction the commissioner is trying to make. *Id.* at 2550 (noting that disparate State definitions of point of sale exposes corporations to uncertain and multiple State tax liabilities to the potential detriment of interstate commerce).

tax interstate commerce within its borders, in violation of the principles of federalism and the Tenth Amendment's reservation of power to the States. See *International Shoe Co.* v. *Cocreham*, 246 La. 244, 266, cert. denied sub nom. *Mouton* v. *International Shoe*, 379 U.S. 902 (1964) (rejecting the Tenth Amendment claim raised here); *State ex rel. CIBA Pharmaceutical Prods., Inc.* v. *State Tax Comm'n*, 382 S.W.2d 645, 657 (Mo. 1964) (same). We disagree.

Congress's plenary power to regulate interstate commerce is well established. See, e.g., *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276 (1981). Consistent with this power, Congress can prohibit States from imposing taxes that interfere with interstate commerce. See, e.g., *Arizona Pub. Serv. Co.* v. *Snead*, 441 U.S. 141, 150 (1979). Where Congress acts within an enumerated power, such as its authority under the commerce clause, the Tenth Amendment is not implicated. *New York* v. *United States*, 505 U.S. 144, 156 (1992).

Moreover, merely limiting the States' power to tax is not sufficient encroachment upon the States' sovereign authority to warrant invalidating a Federal statute under the Tenth Amendment. See *Arizona* v. *Atchison, Topeka & Santa Fe R.R.*, 656 F.2d 398, 407 (9th Cir. 1981) ("We know of no authority for the proposition that Congress may not interfere with state taxation in furtherance of its power over interstate commerce"); *Southeastern Pa. Trans. Auth.* v. *Pennsylvania Pub. Util. Comm'n*, 826 F. Supp. 1506, 1520-1521 (E.D. Pa. 1993) ("The fact that pre-emptive federal legislation may impinge on a state revenue-raising scheme has no special Tenth Amendment implications. . . . Congress can, in furtherance of its commerce power, displace state taxation"), aff'd, 27 F.3d 558 (3d Cir.), cert. denied, 513 U.S. 928 (1994); *Arkansas-Best Freight Sys., Inc.* v. *Cochran*, 546 F. Supp. 904, 910 (M.D. Tenn. 1981) ("[T]he constitutional power of Congress under the commerce clause clearly permits some limitation on the states' power of taxation. As long as the legislation is rationally related to the goal of protecting interstate commerce . . . the mere fact that a state taxation scheme is affected does not itself invalidate the legislation"). Congress enacted § 381 pursuant to its power to regulate interstate commerce. *Kennametal, Inc.* v. *Commissioner of Revenue*, *ante* 39, 41 (1997). See *Heublein, Inc.* v. *South Carolina Tax Comm'n*, 409 U.S. 275, 279-281 (1972). Congress sought to allay concern that arose following the United States

Supreme Court's decision in *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450 (1959), that "mere solicitation" would subject a foreign corporation to State taxation. See *Commissioner of Revenue* v. *Kelly-Springfield Tire Co.*, 419 Mass. 262, 265 (1994); *Heublein*, *supra* at 280. Section 381 sets a uniform minimum standard which must be met before a State may tax interstate commerce. See *Heublein*, *supra* at 280; *CIBA Pharmaceutical Prods.*, *supra* at 657. This is clearly within the ambit of Congress's commerce power. See *International Shoe*, *supra* at 266; *CIBA Pharmaceutical Prods.*, *supra* at 657.

Nor does § 381 exceed Congress's constitutional power by mandating State legislation or otherwise commandeering the States' legislative process. See *New York* v. *United States*, *supra* at 161; *Hodel*, *supra* at 288. Section 381 requires no State legislation or otherwise "command . . . state governments to implement legislation enacted by Congress." *New York* v. *United States*, *supra* at 176. The limitation set in § 381 is a permissibly small preclusion of State taxing power to protect interstate commerce.

The declaration entered by the Superior Court was correct and is affirmed.

So ordered.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
CIVIL ACTION
No. 93-5647-H

NATIONAL PRIVATE TRUCK COUNCIL,
Plaintiff,

vs.

COMMISSIONER OF REVENUE OF
MASSACHUSETTS,
Defendant.

CONCLUSIONS OF LAW AND ORDER

Plaintiff National Private Truck Council ("NPTC"), a national trade association whose members operate truck fleets, brings this action challenging a regulation promulgated by the Massachusetts Commissioner of Revenue ("DOR"). NPTC alleges that 830 Code Mass. Regs. 63.39.1(5)(1993)("the regulation") which applies Massachusetts corporate net income tax to certain foreign corporations using Massachusetts roadways to transact business, violates 15 U.S.C. § 381, commonly referred to as Public Law 86-272 ("P.L. 86-272").[1]

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[1] Since this court finds that the regulation is preempted by federal law, the court will not reach plaintiff's other claims

For the following reasons, this court will enter a declaratory judgment to the effect that 830 Code Mass. Regs. 63.39.1(5) (1993) is preempted by P.L. 86-272.

BACKGROUND

This matter is before the court on a joint statement of agreed facts, incorporated herein by reference.[2] Thus, the record before the court presents a "case stated." *Hickey v. Green*, 14 Mass. App. Ct. 671, 671 n.2 (1982), rev. denied 388 Mass. 1102 (1983), quoting *Quinton Vespa v. Construction Service Co.*, 343 Mass. 547, 551-552 (1962). A case stated is an agreement by the parties of all pertinent facts, from which the court may draw inferences. *Reilly v. Local 589, Amalgamated Transit Union*, 22 Mass. App. Ct. 558, 568, rev. denied, 398 Mass. 1105 (1986). On the basis of these material facts, it is the duty of the court to order the correct judgment of the parties' rights as a matter of law. *Quinton Vespa,* 343 Mass. at 552; *Saiphier v. Devonshire Street Fund, Inc.*, 352 Mass. 683, 685 (1967).

The issue of law before this court is whether 830 Code Mass. Regs. 63.39.1(5), as construed and applied here by the Commonwealth, is preempted by P.L. 86-272.

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regarding the regulation.

[2] The statement contains three separate documents which will be referred to as follows: "[Document name]/[page number]".

CONCLUSIONS OF LAW

The regulation was promulgated under the authority of G.L. c. 63 § 39 (1990), which provides in pertinent part:

> Except as otherwise provided herein, every foreign corporation ... actually doing business in the commonwealth, or owning or using any part or all of its capital, plant or any other property in the commonwealth, shall pay [excise tax]. ... A foreign corporation shall not be subject to tax under this chapter if the foreign corporation is engaged in the business of selling tangible personal property and taxation of that foreign corporation under this chapter is precluded by the Constitution or laws of the United States.

The regulation "describes the circumstances under which a foreign corporation is subject to the tax jurisdiction of Massachusetts under M.G.L. c. 63 § 39." 830 Code Mass. Regs. 63.39.1(1)(a)(1993). The regulation expressly recognizes that the Commonwealth's tax jurisdiction is limited by federal laws, including P.L. 86-272. Under 830 Code Mass. Regs. 63.39.1(5), foreign corporations are immune from Massachusetts' income tax if they fall within P.L. 86-272's ambit. In relevant part, 830 Code Mass. Regs. 63.39.1(5)(a) states:

> A foreign corporation whose activities fall within those described in G.L. c. 63 § 39 and 830 C.M.R. 63.39.1(4) [listing those activities that subject a corporation to taxation] nevertheless is not subject to Massachusetts taxation if Massachusetts is precluded from

> exercising its jurisdiction by P.L. 86-272. ... P.L. 86-272 currently precludes the imposition of the excise under M.G.L. c. 63 § 39, upon a foreign corporation if the sole activity of the corporation in Massachusetts is the solicitation by the corporation's representatives (in the name of the corporation or in the name of a prospective customer) of orders for the sale of tangible personal property, provided that the orders are sent outside Massachusetts for approval or rejection, and provided that the orders are filled by shipment or delivery by common carrier or contract carrier from a point outside of Massachusetts.

The regulation goes on to define which activities constitute solicitation for the purposes of the Commonwealth's tax jurisdiction, tracking the language of *Wisconsin Dept. of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214 (1992). In that case, the United States Supreme Court defined what constituted "solicitation" for purposes of P.L. 86-272.[3]

P.L. 86-272 itself provides in pertinent part that:

> No State ... shall have the power to impose ... a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person ... are either, or both, of the following:

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[3] The *Wrigley* case did not address what constitutes "delivery", specifically the facilities employed for delivery, for purposes of tax immunity under P.L. 86-272.

> (1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State.
>
> (2) the solicitation of orders by such person, or his representative, in such state in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

P.L. 86-272 is not a grant of authority for a state to tax, but rather provides interstate businesses with immunity from state income tax. Richard L. Hirshberg & Alan Nedry, *A Federal Concept of Doing Business*, 46 Va. L. Rev. 1241, 1242 (1960). The DOR recognizes that P.L. 86-272 prohibits a state from imposing an income tax if the corporation's "sole business activities in the state consist of 'solicitation of orders' for tangible goods, provided that the orders are sent outside the state for approval and the *goods are shipped or delivered from out of state*." DOR Directive 95-7/2 (emphasis added).

The parties' disagreement centers around the meaning of "delivery" in the following circumstance: a company wishing to ship or deliver goods into Massachusetts may do so either by common carriage, contract carriage, or private truck. Statement/2. Currently, there is virtually no operating distinction between common carriers and contract carriers. Statement/2. DOR contends that, for the corporation to fall

under P.L. 86-272's immunity, delivery must occur outside Massachusetts via a common carrier. In that event, DOR argues, title to the goods passes to the buyer on assumption of possession by the common carrier, a circumstance that occurs outside Massachusetts and results in statutory immunity. NPTC, on the other hand, contends that "delivery" embraces the circumstance when its members' private trucks deliver the solicited goods. In NPTC's view, foreign corporations who deliver goods into Massachusetts from a point outside the Commonwealth using a private truck are immune from taxation under P.L. 86-272.

A. *Preemption Analysis*

At the outset, this Court notes that as a general rule "preemption is not favored, and state laws should be upheld unless a conflict with federal law is clear. ... The burden is on the party seeking to displace the state action to show preemption with hard evidence of conflict based on the record." *Sawash v. Suburban Welders Supply Co.*, 407 Mass. 311, 315 (1990). The conflict must be actual, not based on mere "unsupported pronouncements as to federal policy." *Attorney General v. Brown*, 400 Mass. 826, 829 (1987).

In addition, federal preemption is less likely to be found in areas of local, rather than national, concern. *Brown*, 400 Mass. at 829. Such is not the case here. P.L. 86-272 and the regulation at issue both address taxation of interstate commerce. While taxation is a joint state and federal concern, the statutes and regulation here impact interstate commerce. Thus, the issues revolve less around local concerns than national ones, and in such an event, preemption is favored. See, *Id.*

Under the Supremacy Clause of Article VI of the Constitution, state courts are "obligated to declare invalid any State statute or regulation" that is preempted by federal law. *Commonwealth v. College Pro Painters (U.S.) Ltd.*, 418 Mass. 726, 728 (1994). Thus, state law that conflicts with federal law is preempted and is "without effect." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).

Preemption analysis arises in three situations. First, a state law will be preempted if, in the text of the federal legislation itself, Congress has explicitly provided that all state laws to the contrary are preempted. *Sawash*, 407 Mass. at 314; *E.E.O.C. v. Commonwealth of Mass.*, 987 F.2d 64, 67 (1st Cir. 1993). That is not the case here. P.L. 86-272 contains no statement of preemption. Rather, the text of the legislation recognizes that states may determine when an income tax will be imposed. It does not specifically preempt the enactment of such state laws.

In the absence of an express statement, preemption may be implied when, based on the totality of the circumstances, Congress has "occupied the field," creating a pervasive and comprehensive scheme of regulation which leaves no room for state legislation. *Brown*, 400 Mass. at 828; *Sawash*, 407 Mass. at 314; *Arthur D. Little, Inc. v. Comm'r of Health and Hospitals of Cambridge*, 395 Mass. 535, 548 (1985); *Building and Construction Trades Council of the Metro. Dist. v. Assoc. Builders and Contractors of Mass./Rhode Island, Inc.*, 507 U.S. 218, 224 (1993); *Tart v. Commonwealth of Mass.*, 949 F.2d 490, 500 (1st Cir. 1990). P.L. 86-272 is inconsistent with an exclusive federal scheme, however, in that it "envisions state participation" in the taxation of foreign corporations by expressly acknowledging state legislation. See, *MacInnes v. Comm'r of Public Welfare*, 412 Mass. 790, 796 (1992).

Third, "if Congress has not displaced state regulation entirely, it may nonetheless preempt state law to the extent that it actually conflicts with the federal law." *Sawash*, 407 Mass. 311; *Brown*, 400 Mass. at 829; *Tart*, 949 F.2d at 500. Actual conflicts arise when "compliance with both state and federal law is impossible or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Sawash*, 407 Mass. at 314; *Brown*, 400 Mass. at 829.

Here, compliance with both statutes is not physically impossible. Some NPTC members use common carriers to ship or deliver goods into Massachusetts. Statement/5. By doing so, the corporation will be immune from taxation under the regulation; thus, it is possible for a corporation to comply with both the federal and state laws in such a way as to avoid taxation.

However, in this court's view, the regulation here does "stand as an obstacle to the purposes and objectives of the federal legislation." To determine what the congressional purposes and objectives of P.L. 86-272 were, Congressional intent is the cornerstone. *Cipollone*, 504 U.S. at 516; *College Pro*, 418 Mass. at 728. See also, *Sawash*, 407 Mass. at 317.

B. *Congressional Intent*

To determine Congressional purpose and intent, the court must "examine the explicit statutory language and the structure and purpose of the statute." *College Pro*, 418 Mass. at 728. P.L. 86-272. "[T]he unambiguous language of [P.L. 86-272] ... is the principal source of insight into congressional purpose, and is to be applied as written." *Comm'r of Revenue v. Kelly-Springfield Tire Co.*, 419 Mass. 262, 267 (1994).

P.L. 86-272 was enacted in response to a series of Supreme Court decisions allowing states to levy income tax on foreign corporations. See, *Id.* at 265; *Heublein. Inc. v. South Carolina Tax Comm'n*, 409 U.S. 275, 279 (1972). In 1959, the Supreme Court held that the net income from a corporation transacting interstate business was taxable by states under a non-discriminatory, fairly apportioned levy. *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959). The Court subsequently denied certiorari in two Louisiana cases, in which the lower courts upheld Louisiana's tax on the income of foreign corporations made on interstate business.[4]

The business community reacted strongly to the impact these decisions would have, particularly on small businesses transacting commerce across state lines. 105 Cong. Rec. 16,359 (1959), quoted in Timothy J. Sweeney, *State Taxation of Interstate Commerce Under Public Law 86-272: "A Riddle Wrapped in an Enigma Inside a Mystery"*, 1984 B.Y.U. L. Rev. 169, 173 n.25-26, 182 (1984); Paul J. Hartman, *"Solicitation" and "Delivery" Under Public Law 86-272: An Uncharted Course*, 29 Vand. L. Rev. 353, 357 (1976). There was concern that as a result of soliciting orders within a state, out-of-state corporations would be exposed to income tax liability. Sweeney, 1984 B.Y.U. L. Rev. at 172; *Heublein*, 409 U.S. at 280.

As a result, P.L. 86-272 was enacted, purportedly as a temporary stop-gap to maintain the status quo pending further

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[4] *Brown-Forman Distillers Corp. v. Collector of Revenue*, 101 So. 2d 70 (La. 1953), cert. denied, 359 U.S. 28 (1959); and *International Shoe Co. v. Fontenot*, 107 So. 2d 640 (La. 1958), cert. denied, 359 U.S. 984 (1959).

study. *Id.* at 281; Sweeney, 1984 B.Y.U. L. Rev. at 181-182; Hartman, 29 Vand. L. Rev. at 362. P.L. 86-272 "substantially limited the power of the states to tax income from interstate commerce." Hirshberg & Nedry, 46 Va. L. Rev. at 1241. It was designed to "define clearly a lower limit for the exercise" of a state's power to tax the local activities of foreign corporations, *Heublein*, 409 U.S. at 280, 281 n.7, by defining what "minimum activities would not be subject to state taxation." Sweeney, 1984 B.Y.U. L. Rev. at 180.

Thus, P.L. 86-272 was intended as a provision for "tax immunity" for businesses engaged solely in certain activities, rather than a grant of authority under which a state may levy a tax. Hirshberg & Nedry, 46 Va. L. Rev. at 1242 n.12.

> The general effect of Public Law 86-272 is to provide guidelines, established by Congress, as to what constitutes 'doing business' within a state for the purpose of determining that state's power to impose a net income tax on income derived from interstate commerce. ... [Public Law 86-272] specifies certain minimum activities which can be carried on within a state by a person engaged exclusively in interstate commerce with the assurance that none of his income can be taxed by such state or political subdivision.

Id. at 1242. From this, it is discerned that the congressional intent and purpose behind P.L. 86-272 "was to remove from the ambit of harassment those businesses having few, if any, real roots in the importing or market state." *Id.* at 1255.

C. *Taxation of Private Truck Deliveries in Other Jurisdictions*

Other states also levy income tax on foreign corporations immune from taxation under P.L. 86-272 but for their use of private trucks to deliver the solicited goods. The results have varied, even within the same state. In 1992, Florida found that a corporation whose only activities within the state were solicitation of orders filled by shipment or delivery from a point outside the state by private trucks was exempt from corporate income tax. Fla. Tech. Assistance Advisement No. 92(M)-008 (October 15,1992), Pl.'s Memo. in Supp. Summ. J. at Appendix C. Three years later, however, Florida treated the shipment and delivery of goods by company-owned vehicles as unprotected, taxable activity. Fla. Tech. Assistance Advisement No. 95(c) 1-004 (March 17, 1995), attached to Def.'s letter to court of June 14, 1995.

In 1992, the Virginia Department of Taxation revoked its prior policy, and began taxing corporations who delivered goods into Virginia using private trucks. Corporation Income Tax - Ruling Req. PD 92-230 (November 9, 1992), attached to Def.'s Memo. in Opp'n Pl.'s Summ. J. at 12 n.3. The Virginia Circuit Court, however, overturned this policy, holding that the Virginia regulation violated P.L. 86-272: "the clear and plain meaning of 15 U.S.C. § 381 is that States may not impose a net income tax on out-of-state corporations whose only contact with the taxing state consists of soliciting orders for goods and delivering the goods into the State in the corporations' own vehicles." Order, Alexandria Circuit Court, dated December 18, 1995, exhibit to Pl.'s Memo. in Supp. of Mo. to File Supplemental Authority.

New York found that delivery using private vehicles was protected under P. L. 86-272. Advisory Op. TSB-A-84(11)C (September 14, 1984), Pl.'s Memo. in Supp. Summ. J. at Appendix A. New Jersey tax authorities also have decided that a manufacturer or wholesaler who merely delivers their own goods into the state in their own trucks is protected under P.L. 86-272. New Jersey State Tax News, Spring 1996, attached to Pl.'s Memo. in Supp. of Second Mo. to File Supplemental Authority in Supp. of Pl.'s Summ. J.

D. *Definition of "Delivery"*

The term "delivery" is not expressly defined in P.L. 86-272, and the lack of federal or state case law interpreting the term leaves this court without a clear statutory directive regarding whether delivery of goods into Massachusetts by private truck is immune from taxation under P.L. 86-272. The legislative history indicates that the congressional committee evaluating P.L. 86-272 believed that delivery of goods in a company-owned vehicle was protected from taxation. See, Fla. Tech. Assistance Advisement No. 92(M)-008 (October 15, 1992), *supra.*, citing the Willis Committee Report.

DOR interprets "delivery", in conjunction with the U.C.C, to mean that title passes outside the Commonwealth through the use of a common carrier. Thus, DOR argues, if a foreign corporation delivers goods into Massachusetts in its own trucks, title passes inside Massachusetts, and P.L. 86-272 does not protect the corporation from Massachusetts income tax.

However, "delivery" also may be defined as the "act of putting property into the legal possession of another," Webster's Unabridged New International Dictionary 597 (3d ed. 1967), regardless of where that transaction occurs. Black's Law

Dictionary defines "delivery" as "the act by which the res or substance thereof is placed within the actual or constructive possession or control of another." Black's Law Dictionary 428 (6th ed. 1990).

A general rule of statutory construction is that "where the language of the statute is plain, it must be interpreted in accordance with the usual and natural meaning of the words." *Comm'r of Revenue v. AMI Woodbroke, Inc.*, 418 Mass. 92, 94 (1994). A court should not construe a statute in such a way that produces an absurd or unreasonable result when a sensible construction otherwise is readily available. *Manning v. Boston Redevelopment Auth.*, 400 Mass. 444, 453 (1987).

A reasonable, sensible construction of the term "delivery" in the context of P.L. 86-272 would thus not limit it solely to deliveries occurring out-of-state. P.L. 86-272 is clear on its face. Under its explicit language, Massachusetts may not tax a corporation whose only business activity within the Commonwealth consists of soliciting orders for tangible goods, provided that "the orders are sent outside the State f or approval and the goods are delivered from out-of-state." *Wrigley*, 505 U.S. at 215. As long as the solicited goods are shipped or delivered from a point outside the state, the corporation is immune from income tax based on that transaction. Hartman, Vand. L. Rev. at 360-361. If Congress had intended to define "delivery" to include only those transfers of title occurring outside the taxing state, it would have inserted language to that effect. See, *Kelly-Springfield*, 419 Mass. at 267.

DOR also argues that delivery in private vehicles creates a separate and significant service in Massachusetts, creating a business presence within the Commonwealth and subjecting the corporation to Massachusetts' income tax. The court is

unpersuaded. The deliveries at issue are directly connected to the solicitation activities protected under P.L. 86-272.

DOR also contends that P.L. 86-272 is unconstitutional because it impairs the sovereign power of Massachusetts to tax commerce within their borders. This contention is without merit. The constitutionality of P.L. 86-272 was upheld in *International Shoe Co. v. Corcreham*, 164 So. 2d. 314 (La.), *cert. denied*, 379 U.S. 902 (1964). Furthermore, P.L. 86-272 only provides immunity from net income taxes. It does not prevent Massachusetts from taxing foreign corporations based on unprotected activities, such as an out-of-state corporation maintaining an office or place of business within the Commonwealth, or engaging in activities beyond the scope of P.L. 86-272.

E. *Conclusion*

The regulation imposes income taxes on corporations who have made a business decision to conduct transactions across interstate lines using private trucks, instead of common carriers, to deliver their goods into Massachusetts. Approximately 45% of corporations using private trucks are engaged in manufacturing. Private Fleet Profile/15. These corporations may have decided to use private trucks, for example, because the use of a private truck may be more appropriate for short hauls of heavy goods, or longer hauls of lighter goods. Private Fleet Profile/15.

Congress enacted P.L. 86-272 to protect corporations from being taxed by a state when its only contact with that state was solicitation of goods, and shipment or delivery of those goods from a point outside the taxing state. NPTC has met its burden of proof by demonstrating that the regulation places tax liability

on a foreign corporation which would otherwise be immune under P.L. 86-272. This exercise of the Commonwealth's tax jurisdiction conflicts with the purpose and policies behind the enactment of P.L. 86-272.

ORDER

For the foregoing reasons, it is hereby ***ORDERED*** that a declaration shall enter ***DECLARING*** that:

Regulation 830 Code Mass. Regs. 63.39.1(5) (1993) violates 15 U.S.C. § 381 (P.L. 86-272) by reducing the scope of tax immunity the federal statute affords to foreign corporations whose only contact with Massachusetts consists of soliciting orders for tangible personal property, and delivering such property into the Commonwealth from a point outside Massachusetts in the corporation's private vehicles.

Judgment to enter accordingly.

David M. Roseman
Justice of the Superior Court

DATED: January 3, 1996

COMMONWEALTH OF MASSACHUSETTS
COUNTY OF SUFFOLK
THE SUPERIOR COURT

DOCKET # SUCV93-05647H

RE: *National Private Truck Council v Commissioner of Revenue of Massachusetts*

TO: Thomas A. Barnico
Mass Atty General's Office
1 Ashburton Place
Boston MA 02108

NOTICE OF DOCKET ENTRY

You are hereby notified that on 03/10/97 the following entry was made on the above referenced docket:

JUDGMENT: It is Ordered and Adjudged, That Massachusetts regulation 830 Code Mass Regs 63.39.1(5) (1993) violates 15 U.S.C. § 381 (P.L. 86-272) by reducing the scope of tax immunity the federal statute affords to foreign corporations whose only contact with Massachusetts consists of soliciting orders for tangible personal property, and delivering such property into the Commonwealth from a point outside Massachusetts in the corporation's private vehicles; That 830 Code Mass Reg 63.39.1 (5) (1993) as applied to such foreign corporations is hereby declared to be preempted by 15 U.S.C.

§ 381 (P.L. 86-272); and That 15 U.S.C. § 381 (P.L. 86-272) is constitutional. (Roseman, J.) entered on docket pursuant to Mass R Civ P 58(a) and notice sent to parties pursuant to Mass R Civ P 77(d).

Dated: 18th day of March, 1997

Michael Joseph Donovan
Clerk of the Courts

BY:
Francis T Foley, Asst. Clerk
Telephone: 617-725-8217